

to contain any material in the record to which public access is restricted by law or by the terms of a protective order entered in the proceedings. This portion of the record shall be placed in a separate file and clearly marked to avoid improper disclosure and to identify it as a portion of the official record in the proceedings.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534-91, 56 FR 50053, Oct. 3, 1991]

**§ 68.52 Decision and order of the Administrative Law Judge.**

(a) *Proposed decision and order.* Within twenty (20) days of filing of the transcript of the testimony, or such additional time as the Administrative Law Judge may allow, the Administrative Law Judge may require the parties to file proposed findings of fact, conclusions of law, and orders together with supporting briefs expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision.* Unless an extension of time is given by the Chief Administrative Hearing Officer on good cause, the Administrative Law Judge shall make his/her decision within sixty (60) days after receipt of the hearing transcript or of receipt by the Administrative Law Judge of post-hearing briefs, proposed findings of fact, and conclusions of law, if any. The decision of the Administrative Law Judge shall be based upon the whole record. It shall be supported by reliable and probative evidence. The standard of proof shall be by a preponderance of the evidence. Such decision shall be in accordance with the regulations and rulings of the statute or regulations conferring jurisdiction.

(c) *Order—(1) Unlawful employment of unauthorized aliens.* (i) If upon the preponderance of the evidence, the Administrative Law Judge determines that a person or entity named in the complaint has violated section 274A(a)(1)(A) or (a)(2) of the INA, the order shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of:

(A) Not less than \$250 and not more than \$2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred;

(B) Not less than \$2,000 and not more than \$5,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred in the case of a person or entity previously subject to one order under this subparagraph; or

(C) Not less than \$3,000 and not more than \$10,000 for each unauthorized alien with respect to whom a violation of each such subsection occurred in the case of a person or entity previously subject to more than one order under this subparagraph.

(ii) The order may also require the respondent to comply with the requirements of section 274A(b) of the INA with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years; and to take such other remedial action as is appropriate.

(iii) In the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and under the control of, or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(iv) With respect to a violation of section 274A(a)(1)(B) of the INA, the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than \$100 and not more than \$1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

(v) *Prohibition of indemnity bonds.* If upon the preponderance of the evidence, the Administrative Law Judge determines that a person or entity has violated section 274A(g)(1) of the INA, the order shall require the person or entity to pay a civil penalty of \$1,000

for each individual with respect to whom such violation occurred and require the return of any amounts received in such violation to the individual, or, if the individual cannot be located, to the general fund of the Treasury.

(vi) *Attorney fees.* A prevailing party may receive, pursuant to 5 U.S.C. 504, an award of attorney's fees in unlawful employment and indemnity bond cases arising under section 274A of the INA. Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed. An award of attorney's fees will not be made if the Administrative Law Judge determines that the complainant's position was substantially justified or special circumstances make the award unjust.

(2) *Unfair immigration-related employment practice cases.* (i) If, upon the preponderance of the evidence, the Administrative Law Judge determines that any person or entity named in the complaint has engaged in or is engaging in an unfair immigration-related employment practice, the order shall include a requirement that the person or entity cease and desist from such practice. The order may also require the person or entity:

(A) To comply with the requirements of section 274A(b) of the INA with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years;

(B) To retain for a period of up to three years, and only for purposes consistent with section 274A(b)(5) of the INA, the name and address of each individual who applies, in person or in writing, for hiring for an existing position, or for recruiting or referring for a fee, for employment in the United States;

(C) To hire individuals directly and adversely affected, with or without back pay;

(D) To post notices to employees about their rights under this subsection and employers' obligations under section 274A;

(E) To educate all personnel involved in hiring and in complying with section

274A or 274B about the requirements of 274A or 274B;

(F) To order, in an appropriate case, the removal of a false performance review or false warning from an employee's personnel file;

(G) To order, in an appropriate case, the lifting of any restrictions on an employee's assignments, work shifts, or movements;

(H) Except as provided in paragraph (c)(2)(i)(K) of this section, to pay a civil penalty of not less than \$250 and not more than \$2,000 for each individual discriminated against;

(I) Except as provided in paragraph (c)(2)(i)(K) of this section, in the case of a person or entity previously subject to a single order under section 274B(g)(2) of the INA, to pay a civil penalty of not less than \$2,000 and not more than \$5,000 for each individual discriminated against;

(J) Except as provided in paragraph (c)(2)(i)(K) of this section, in the case of a person or entity previously subject to more than one order under section 274B(g)(2) of the INA, to pay a civil penalty of not less than \$3,000 and not more than \$10,000 for each individual discriminated against; and

(K) In the case of an unfair immigration-related employment practice where an individual requests more or different documents than are required under section 274A(b) or refuses to honor documents that reasonably appear to be genuine, to pay a civil penalty of not less than \$100 and not more than \$1,000 for each individual discriminated against or to order any of the remedies listed as paragraphs (c)(2)(i)(A) through (c)(2)(i)(G) above.

(ii) Back pay liability shall not accrue from a date more than two years prior to the date of the filing of the complaint. In no event shall back pay accrue from before November 6, 1986. Interim earnings or amounts earnable with reasonable diligence by the individual or individuals discriminated against shall operate to reduce the back pay otherwise allowable. No order shall require the hiring of an individual as an employee or the payment to an individual of any back pay, if the individual was refused employment for any reason other than discrimination on

account of national origin, or citizenship status, unless it is determined that an unfair immigration-related employment practice exists under section 274B(a)(5) of the INA.

(iii) In applying paragraph (c)(2) of this section in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with another subdivision, each such subdivision shall be considered a separate person or entity.

(iv) If upon the preponderance of the evidence, the Administrative Law Judge determines that a person or entity named in the complaint has not engaged in and is not engaging in an unfair immigration-related employment practice, then the order shall dismiss the complaint.

(v) *Attorney fees.* The Administrative Law Judge in his or her discretion may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact. Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed.

(3) *Document fraud cases.* (i) If upon the preponderance of the evidence, the Administrative Law Judge determines that a person or entity has violated section 274C of the INA, the order shall include a requirement that the respondent cease and desist from such violations and to pay a civil money penalty in an amount of:

(A) Not less than \$250 and not more than \$2,000 for each document used, accepted or created and each instance of use, acceptance or creation, as prohibited by section 274C(a) (1) through (4) of the INA; or,

(B) In the case of a respondent previously subject to one order under subsection 274C(d)(3) of the INA, not less than \$2,000 and not more than \$5,000 for each document used, accepted, or created and each instance of use, accept-

ance or creation, as prohibited by section 274C(a) (1) through (4) of the INA.

(ii) In the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and under the control of, or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(iii) *Attorney fees.* A prevailing party may receive, pursuant to 5 U.S.C. 504, an award of attorney's fees in document fraud cases arising under section 274C of the INA. Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed. An award of attorney's fees will not be made if the Administrative Law Judge determines that the complainant's position was substantially justified or special circumstances make the award unjust.

(4) *Corrections to orders.* An Administrative Law Judge may, in the interest of justice, correct any clerical mistakes or typographical errors contained in a decision and order issued in a case arising under section 274A or 274C of the INA at any time within thirty (30) days after the issuance of the decision and order. Changes other than clerical mistakes or typographical errors will be considered in cases arising under sections 274A and 274C of the INA by filing a request for review to the Chief Administrative Hearing Officer by a party under § 68.53, or the Chief Administrative Hearing Officer may exercise discretionary review to make such changes pursuant to § 68.53. In cases arising under section 274B of the INA, an Administrative Law Judge may correct any substantive, clerical, or typographical errors or mistakes in a decision and order at any time within sixty (60) days after the issuance of the decision and order.

[54 FR 48596, Nov. 24, 1989. Redesignated and amended by Order No. 1534-91, 56 FR 50053, 50056, Oct. 3, 1991; Order No. 1635-92, 57 FR 57672, Dec. 7, 1992]